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Supreme Court, U.S.
FILED
MAR 21 1996
CLERK

No. 95-1322

In the
Supreme Court of the United States
October Term, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, et al.,
and MELLON MORTGAGE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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39pp

QUESTION PRESENTED

In a nationwide class action settlement which secures predominantly injunctive and declaratory relief, and monetary relief only incidental to that, does certification of a non-opt out class under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(1) comply with due process when procedures are made available to class members to receive notice, object and be fully heard, and non-absent class members submit to the jurisdiction of the District Court and participate extensively in the settlement process by entering an appearance, moving to intervene pursuant to Fed.R.Civ.P. 24, and filing extensive legal memoranda with exhibits objecting to merits of the settlement, adequacy of representation and their inclusion in the terms of the settlement ?

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No. 95-1322

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,

Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, et al.,
and MELLON MORTGAGE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

Respondents Gretchen DeBoer and all others similarly situated, respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Eighth Circuit's opinion below. That opinion is reported at 64 F.3d 1171 (8th Cir. 1995) and is reprinted in the petition for certiorari at Appendix A1.

STATUTES INVOLVED

Federal Rule of Civil Procedure 23(b) provides in part:

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class would as a practical matter be dispositive if the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

STATEMENT OF THE CASE

1. DeBoer's Minnesota Action.

This case was commenced as a nationwide class action challenging Respondent-Mellon Mortgage Co.'s ("Mellon") mortgage escrow accounting practices in Hennepin County, Minnesota, District Court, in September 1992. In general, the action alleged that in its common course of servicing its mortgagors' escrow accounts, Mellon demanded and maintained excess deposits for payment of property taxes and insurance in violation of the limitations set forth in its mortgagors' standard form contracts and the Real Estate Settlement Procedures Act. 12 U.S.C. § 2609, and failed to refund or credit identified surplus funds in those accounts. Ms. DeBoer's action sought to enjoin Mellon from requiring any of its mortgagors to establish or maintain an escrow account with a reserve for unanticipated increases in the items to be paid from the accounts in excess of the excess authorized by the underlying mortgage contract or federal law and to mandate the annual automatic refund of excess balances that had been impounded. The suit also sought to force Mellon to adjust its escrow accounts to ensure future compliance with such standards.

The action was subsequently removed to the United States District Court for the District of Minnesota, Chief Judge Diana Murphy presiding. The Court then placed this case before Magistrate Judge Jonathan Lebedoff as part of a group of similar cases where the parties had indicated a willingness to explore the possibility of settlement. Mellon, without conceding that its escrow accounting procedures were improper, indicated a desire to reach a reasonable compromise that would put an end to disputes about whether escrow

accounts had been maintained lawfully. A lengthy and quite complex negotiation followed which focused on three key substantive areas:

a) Mellon's escrowing practices and any surpluses it might be holding in current mortgagors' escrow accounts;

b) Mellon's escrow accounting practices going forward, and the provision of satisfactory assurance that all unrefunded excess balances would be refunded in the future; and

c) Mellon's responsibility for damages to the extent it had held escrow surpluses in the past without paying interest on such balances.

Following this process, and only after several months of negotiation under the Court's supervision, the parties moved for approval of their settlement. Under the settlement, Mellon agreed to conduct its escrow practices in the future pursuant to the mechanism set forth in the Settlement Agreement, including the automatic refunding of escrow account surpluses, and to pay a modest damage "rebate" constituting imputed interest on past over-escrowed balances.[1] The Agreement provided that payment requirements for escrow accounts would, in the future, be based upon a reasonable estimate of the amount of money needed to fund the escrow items to be paid as they became due; that this reasonable

[1] It is important to understand that the "damage" aspect of the case involved only imputed interest on past alleged over-escrowed sums, a relatively small sum where typical overages might, on an individual basis, be only a few dollars.

estimate would then be spread over twelve equal monthly payments; and that if, at the regularly scheduled next analysis of the account it was determined that the reasonable estimate was an over-estimate, and that surplus funds were in the account, the surplus would be automatically refunded, in full, to the mortgagor, unless it was too small for a refund to be economically feasible, in which case it would be available to meet escrow requirements for the following year. The injunctive provision requiring automatic refunding of overages, which was not occurring before this lawsuit forced its adoption, has and will result in millions of dollars being returned annually to members of the Class. Petition at A-11; SA at 46-48, 55-58, 84-86. Mellon also agreed to make a payment towards class counsel's fees and bear the cost of notice. Petition at A4; SA 91.

By order dated October 29, 1993, the United States District Court for the District of Minnesota held that the proposed settlement fell "within the range of reasonableness" and that the action was appropriate to preliminarily certify for settlement purposes under Fed.R.Civ.P. 23(b)(1) and 23(b)(2) ("Rule 23(b)(2)" or "(b)(2)"). Notice of the settlement was mailed to all class members, approximately 300,000 mortgagors. SA 91 Petitioners Michael and Suzannne Crehan ("Petitioners" or "Crehans") were one of only five timely objections received from that huge class. Petition at A4.

Petitioners requested leave to enter an appearance with the District Court on March 7, 1994. JA 24. Petitioners submitted extensive memoranda, exhibits and affidavits objecting to the substantive terms of the settlement, adequacy of representation, class certification under Fed.R.Civ.P. 23(b)(1) and 23(b)(2) opposed to Fed.R.Civ.P. 23(b)(3), and their inclusion within the class. JA 25-48; JA 105-110; JA

144-159; JA 165. Petitioners moved to intervene pursuant to Fed.R.Civ.P. 24(a) and 24(b) on April 11, 1994. JA 24.

The District Court granted final approval to the settlement on June 14, 1994. JA. 17-21 The merits of Petitioners' arguments were addressed by Judge Murphy and found to be lacking sufficient merit to warrant failing to approve the proposed settlement which granted substantial benefits to the class as a whole and was acceptable to hundreds of thousands of other class members.[2] JA 9-21. On July 5, 1994 the Court granted Petitioners' motion to intervene for the limited purpose of preserving the right to appeal the approval of the proposed settlement. JA 24.

The Eighth Circuit Court of Appeals considered Petitioners' comprehensive arguments addressing the merits of the action and upheld the District Court's order certifying the class under Fed.R.Civ.P. 23(b)(2) and Fed.R.Civ.P. 23(b)(1) and approving the settlement as fair, reasonable and adequate to the class. Petition at A1-A17. Specifically, the Court held that certification as a Rule 23(b)(2) class was appropriate as the class sought predominantly injunctive relief against Mellon's alleged over-escrowing practices, resulting in future benefits and savings to the class in the millions of dollars. Petition at A-7-A9, A-11-A12; SA at 46-48. Additionally,

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[2] The essence of the Crehans' objection was that the settlement involved the compromise of certain issues, rather than the abject capitulation of Mellon. The Eighth Circuit and the District Court, however, specifically recognized the risks of further litigation in approving the settlement as reasonable. Petition at A10-A11. *See, Attorney General v. Michigan National Bank*, 325 N.W.2d 777 (Mich 1982); *Burkhardt v. City National Bank*, 226 N.W.2d 678 (Mich Ct. App. 1975) (challenge to single-item analysis based upon language in Fannie Mae mortgage rejected).

certification under Fed. R. Civ. P. 23(b)(1) was upheld.[3] Petition at A7.

The Court found that the fact that modest monetary relief was obtained incidental to the predominant injunctive relief sought and obtained did not render certification under Fed.R.Civ.P. 23(b)(2) and 23(b)(1) inappropriate. Petition at A7-A8, A11-A12. *See also, Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982); *White*, 822 F.Supp. 1389, 1411 (D.Minn. 1993); *Robinson v. Lorillard Corporation*, 444 F.2d 791, 801-02 (4th Cir. 1971); *Probe v. State Teacher Retirement Sys.* 780 F.2d 776, 780 (9th Cir.) *cert denied* 476 U.S. 1170 (1986). Rather, the Court held that "when either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation." Petition at A-7, *citing*, *Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978). *See also, White*, 822 F.Supp. at 1409.[4] The

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[3] The present case was appropriate for certification under Rule 23(b)(1) as the threat of conflicting adjudications and incomparable standards, should parties be permitted to opt-out, carries the risk of subjecting Mellon to opposing and irreconcilable court orders. If individual mortgagors file separate actions seeking injunctive relief against Mellon's escrow practices there would be a substantial risk of inconsistent or varying adjudications which would result in incomparable standards of conduct for Mellon. One court could grant injunctive relief, while another may deny such relief and a third court may grant a material different form of relief. "Differing results in individual actions would impair the ability to 'pursue a uniform continuing course of conduct where pragmatic considerations require that Defendants act in the same manner to all members of the class." *White v. National Football League*, 822 F.Supp 1389, 1408 (D.Minn. 1993).

[4] *Van Gemert v. Boeing Corp.*, 259 F.Supp. 125, 130-31 (S.D.N.Y. 1966) *aff'd on separate grounds*, 573 F.2d 733 (2d Cir), *rehg granted*, 590 F.2d 433 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980); *See also*, 1

Court found that the class representation and notice were adequate. Petition at A6, A9.

Significantly, the Eighth Circuit held that by submitting extensive memoranda to the District Court challenging the substance of the settlement and adequacy of representation, moving to intervene and reaffirming their position to the Court of Appeals, Petitioners submitted to the jurisdiction of the District Court and therefore had been afforded all minimum due process required under *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 & n.3 (1985). ("Essentially, the Crehans have had their day in court to point out the shortcomings of Mellon's practices and of the settlement on the merits, precisely what they requested in their briefs to the Court.") Petition at A8-A9. The Court held that Petitioners were not absent class members due to Petitioners' submission to the Court's jurisdiction, and therefore the issue left unresolved in *Shutts* as to whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief was really not at issue. The Crehans may have been many things below, but absent and unheard were neither of them. Petition at A7-A9.

2. Crehans' Virginia Action.

In August, 1993 Petitioners brought an independent suit against Mellon in the United States District Court for the Eastern District of Virginia asserting claims under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and common law fraud

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Herbert Newburg and Alan Conte, *Newburg on Class Actions*, § 4.20, at 4-71 (3d ed. 1992).

and seeking to recover $3,000,000.00 in punitive damages from Mellon. SA at 117-130. The Virginia court dismissed the Crehan's RICO claim with prejudice pursuant to Fed.R.Civ.P. 12(b)(6) and their fraud claim without prejudice under the doctrine of *United Mine Workers v. Gibbs*, 373 U.S 715 (1968). SA 117-130. In dismissing the action, the Virginia Court held that as a matter of law appellants could not recover punitive damages in excess of $50,000.00 based upon likely actual damages of less than $10.00 and "to a legal certainty" Petitioners' allegations that they disagreed with Mellon's accounting methodology did not amount to a fraud claim. (JA 121-22; SA 117-30) The District Court denied the Crehan's request to amend judgement and for leave to replead. *Crehan v. Mellon Mortgage Co.*, No. CA-93-1017-A (E.D.Va. Oct. 19 & Nov. 22, 1993). The United States Court of Appeals for the Fourth Circuit affirmed the District Court's orders in an unpublished opinion. *Crehan v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994)(table).[5]

In this petition, the Crehans argue that they should have been afforded the right to opt out of the class action settlement on their admittedly minute money damage claims and that the Federal Rules of Civil Procedure and the Constitution guarantee them those rights. A review of the facts of this case and relevant authorities reveals that there is not an absolute right to opt out of a class properly certified under Fed.R.Civ.P. 23(b)(2) and 23(b)(1), that due process was afforded the Crehans who submitted to the jurisdiction of

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[5] The Fourth Circuit's decision upholding the United States District Court for the Eastern District of Virginia's dismissal of the Crehan's Virginia action, and expressing skepticism towards the Crehan's claims further supports Mellon's defenses and therefore the adequacy and reasonableness of the approved settlement. *Crehan v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994)(table); SA at 117-130.

the District Court, that the Circuit Courts of Appeal are not divided on these issues, and therefore certiorari should be denied.

REASONS TO DENY THE WRIT

In an effort to invoke this Court's jurisdiction, the Petitioners attempt to create a conflict where there is none. Not a single one of the cases which Petitioners cite as being in conflict with the decision below involved class members in the position of Petitioners or even remotely similar facts. All involve carefully delineated and narrow applications of the same rule of law, that do not apply to the facts of this case. Since there is no direct, real or intolerable conflict among the Circuits on the issue presented, there is no foundation for review.

Consequently, this case does not provide a vehicle to consider the question of whether absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf. Petitioners have already been afforded due process and the Eighth Circuit's decision is not in conflict with the decisions of other Courts of Appeal.

I. The Eighth Circuit's Opinion Is In Harmony With Other Circuit Courts of Appeal, Since No Court of Appeals, Including the Ninth Circuit, Maintains That There Is An Absolute Right To Opt Out of A Rule 23 (b)(2) or Rule 23 (b)(1) Class Seeking Predominantly Injunctive Relief.

The first ground on which Petitioners seek reconsideration of the Eighth Circuit's decision below is their

contention that certification of Respondent DeBoer's damage claims is prohibited by Rule 23(b)(2) itself. Petitioners' argue that as a matter of law, they should have been provided the opportunity to opt out of the mandatory class certified under Fed.R.Civ.P. 23(b)(1) and 23(b)(2) because the fact that the Class's claims seek some money damages, in addition to injunctive relief, renders those claims ineligible for Rule 23 (b)(2) certification.[6]

The law is clear, however, that "class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages." *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir.) *cert. denied*, 476 U.S. 1170 (1986); *White v. National Football League*, 822 F.Supp. 1389, 1410 (D.Minn. 1993) *aff'd* 41 F.3d. 402 (8th Cir. 1994), *cert denied*, 115 S.Ct. 2569 (1995); *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). The definitive authority on the intended construction and application of the rule, the Rules Advisory Committee Notes to the 1966 Amendments to Rule 23 that added subpart 23(b)(2) clarify that a class may not be maintained under subpart (b)(2) where "the appropriate final relief relates exclusively or predominantly to money damages."*Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, reprinted at 39 F.R.D. 69, 102 (1966). *See, Arnold v. United Artists Theater Circuit,*

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[6] Ms. DeBoer, on behalf of the class self-evidently sought primarily equitable relief from Mellon's alleged over-escrowing practices. Petition at A3. Petitioners', however, continue to contend that DeBoer's claims and their own claims are primarily for monetary damages and are not for equitable relief. The Eighth Circuit readily disagreed with Petitioner's contentions and found the monetary relief sought "incidental" to the predominant injunctive relief sought and obtained. Petition at A7. This conclusion is supported by the record.

Inc., 158 F.R.D. 439, 461 (N.D.Cal. 1994). "Thus, unimpeachable authority dictates that money damage claims may be certified under (b)(2) so long as the monetary claims do not 'predominate' over the claims for declaratory or injunctive relief." *Arnold*, 158 F.R.D. at 461. *See, White v. National Football League*, 822 F.Supp. 1389, 1410 (D.Minn. 1993) *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994) *cert denied*, 115 S.Ct. 2569 (1995); *In re Jackson Lockdown. MCO Cases*, 107 F.R.D., 703, 713-14 (E.D.Mich. 1985).

In the instant action, both the Eighth Circuit and the District Court concluded that the cohesiveness of the class and the homogeneity of the class member's interests in seeking and obtaining predominantly injunctive relief against Mellon's alleged common, computer-driven over-escrowing practices were the salient factors on which the availability of the (b)(2) class action was based. Petition at A7. "The fact that damages were sought incidentally to the prayer for injunctive relief [did] not affect this result." *Id. citing, Paxton v. Union National Bank*, 688 F.2d 552, 563 (8th Cir. 1982). *See, White*, 822 F.Supp. at 1410-11. The injunctive benefits were estimated to be in the millions of dollars, considerably more significant than the modest monetary relief. Petition at A-11; SA at 44-48.

In contrast to a class certified under Fed.R.Civ.P. 23(b)(3), under Fed.R.Civ.P. 23(b)(1) and Rule 23(b)(2), there no absolute right to opt-out of the class action. Fed R. Civ. P. 23(1)(2). *White*, 822 F.Supp. at 1410-12, aff'd 41 F.3d 402, 407-09 (8th Cir. 1994); *United States v. United States Steel Co.*, 520 F.2d 1043, 1057 (5th Cir. 1975). Under Fed.R.Civ.P. 23(d)(2), however, the Court is vested with the discretion to require notice and other procedural safeguards that are not mandated under Rule 23 or the constitution. *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981). This discretionary power permits courts to allow

exclusion in Rule 23(b)(1) and (b)(2) class actions whenever the court deems it appropriate. The Circuit Courts of Appeal are not divided on this issue as no Court of Appeals has held that there is an absolute right to opt-out of a class certified under Fed.R.Civ.P. 23(b)(1) and Rule 23(b)(2) which only includes monetary relief incidental to the predominant injunctive benefits sought. *See e.g., Report and Recommendations of the Special Committee On Class Action Improvements,* 110 F.R.D. 195, 206-07 (1986). Such a right only arises when a Court exercises its discretion to permit opt-outs.[7]

This is demonstrated by the very cases relied on by Petitioners to show class members in certain circumstances have been permitted to opt-out of mandatory classes. Each case relied upon by Petitioners is merely an example of the court using its discretionary power under Fed.R.Civ.P. 23(d)(2) to protect class member's interests as it deems necessary in the particular circumstances of those cases. *See, Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981), *cert denied*, 479 U.S. 883, 107 S.Ct. 274, 93

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[7] *See generally, Newburg on Class Actions* (3rd Ed. 1992) §16.17 No Absolute Right of Exclusion or Appearance for Class Members in Rule 23(b)(1) or (b)(2) Classes, at 16-91 - 16-98, *citing cases including, Penson v. Terminal Transport Co.*, 634 F.2d 989, 993-94 (5th Cir. 1981) and *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), and stating: "The cohesiveness or unity theory has broken down somewhat "with the advent if the 'hybrid' Rule 23(b)(2) class action in which individual monetary relief for class members, typically back pay, is sought in addition to classwide injunctive relief, and some courts have held that 'where monetary relief is sought and is made available in a Rule 23(b)(2) class action, "notice is no longer discretionary but is required at some stage in the proceedings, though the right to opt out of the suit has remained subject to the discretion of the court, even when monetary relief is sought and available."

L.Ed.2d 250 (1986)("The conclusion to be drawn from the above survey of the law is that a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, even where monetary relief is sought and made available....A district court, however, acting under its Rule 23(d)(2) discretionary power, may require that an opt out right and notice thereof be given should it believe that such a right is desirable to protect the interests of the absent class members.")[8]; *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983)(Absent class members of Rule 23 (b)(2) class have no automatic right to opt out of lawsuit and to prosecute entirely separate action: In certain instances, however, parties themselves or court in its discretion under Rule 23(d)(2), may provide for such procedure). *See also, Williams v. Burlington Northern, Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987)(same); *Crawford v. Honig*, 37 F.3d 485, 487 & n.2 (9th Cir. 1994)(no absolute right to opt-out of Rule 23(b)(2) class); *Grimes v. Vitalink Communication Co.*, 17 F.3d 1553 (3rd Cir.)(notice of class action plus opportunity to be heard and participate in litigation is all that is needed to satisfy due process rights of non-resident class members with sufficient contacts with forum, even if members were not given opportunity to opt out of class), *cert. denied*, 115 S.Ct. 480 (1994). Therefore, case law unanimously holds that while an opt out right may be made available in a Rule 23(b)(2) or (b)(1) class, it is done by discretion of the court pursuant to Rule 23(d)(2) rather than any mandate in the Federal Rules of Civil Procedure.

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[8] In an opinion that was released almost simultaneously with *Penson*, the Fifth Circuit held that "the right to opt out, which is denied when a Rule 23(b)(2) case is tried, also need not be provided when such a case is settled." *Kincaide v. General Tire and Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).

Petitioners' argument that a mandatory right to opt out of a Rule 23(b)(2) action such as the case at Bar exists is based entirely on Petitioners' false premise that the predominant relief sought and afforded in this case was monetary damages, rather than injunctive relief. The Eighth Circuit made clear, however, that the damage claims in the instant action were clearly incidental to the predominant injunctive benefits sought and obtained by the settlement. Petition at A7, A11-A12. Petitioners' misinterpretation of the settlement cannot form the basis for their petition. As a result, certiorari should be denied.

II. The *Shutts* Issue Does Not Arise With Regard To Petitioners' Claims As Petitioners Were Not Absent Class Members and Were Afforded Minimum Due Process Having Received Adequate Notice; Moved To Intervene Under Fed.R.Civ.P. 24, and Participated Extensively in the Settlement Process Through the Submission of Legal Memoranda Arguing the Substantive Issues Litigated, Adequacy of Representation and the Right To Be Excluded.

In an effort to obtain review here, the petitioners have mischaracterized the nature of the question presented. The Petitioners' question presented suggests that the District Court below found Petitioners to be absent class members and that the predominant relief sought and obtained in the class action was monetary damages rather than injunctive relief.[9] *See*,

[9] In their petition, Petitioners continue to misconstrue the settlement terms for the Court by ignoring the injunctive benefits conferred and emphasizing the modest monetary relief. For example, Petitioners claim: "Rather, the settlement rewrites each class member's individual mortgage contract to conform to Mellon's past practices and to allow Mellon to

Petition, "Question Presented for Review," at i. This suggestion is incorrect.

Based on these erroneous assumptions, Petitioners dispute the court's exercise of jurisdiction over them as objecting class members. Specifically, Petitioners contend that the District Court and Eighth Circuit erred in failing to apply the standard set forth by the Supreme Court in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985), which required that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court in cases seeking primarily monetary damages.

Contrary to Petitioners' suggestion, this case does not present any due process problems in the composition of a mandatory class. As the Eighth Circuit correctly held, Petitioners were not absent class members and had been afforded due process unlike the situation in *Shutts, supra* and

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retain more than it had been contractually permitted to retain at the time the suit was filed."

Petition at 3.

Petitioners' statements are misleading as recognized by the Eighth Circuit below, which addressed the deficiencies in Petitioner's interpretation of the settlement, stating: "Interpretation of the contractual obligations is not so cut and dried as the Crehans would have us believe and the FNMA form does not require the automatic refunding that is now available to the class....The settlement does not allow Mellon to increase anyone's loan obligation." Petition at A12.

Moreover, Petitioners' illogically complain that the parties' settlement, negotiated and approved in 1993, failed to confer any benefit on the class since new regulations were subsequently promulgated by HUD in May, 1995 which require some of the benefits negotiated and obtained in this private settlement two years earlier.

Brown, infra, and, in addition, monetary relief did not predominate. Petition at A7-A9 ("Nor must we today decide the question whether a suit seeking equity can bind a putative class member, thus preventing a subsequent suit for damages . . . because the Crehans are not absent plaintiffs in this action"). *See also, White,* 41 F.3d at 407.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75 & n.3 (1985) the Supreme Court left open the question of whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief. However, the Eighth Circuit below correctly held that this qūestion was unnecessary to address when objectors such as the Crehans' had fully submitted to the Court's jurisdiction and were fully and formally heard on the substantive issues of the litigation and adequacy of representation. Petition at A7-A9. No Court of Appeal is in conflict with this position. *See, White v. National Football League,* 822 F.Supp. at 1410-12, 836 F.Supp 1501-04, *aff'd,* 41 F.3d 402, 407-08 (8th Cir. 1994)(Each objector had minimum contacts with forum or subjected themselves to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony and filing numerous memorandums of law regarding the settlement); *Grimes v. Vitalink Comm. Corp.,* 17 F.3d 1553, 1560 n.8 (3d Cir.)(concluding that due process protections "bind absent class members who had sufficient minimum contacts with the forum" even in the absence of an opt-out provision), *cert denied,* 115 S.Ct. 480, 130 L.Ed.2d 393 (1994); *In re Real Estate Title and Settlement Serv. Antitrust Litig.,* 868 F.2d 760, 770-71 (3d Cir. 1989)(noting that in the context of a mandatory class action "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the

District Court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum"), *cert denied,* 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed. 44 (1989); *Trans World Airlines Inc. v. Mattox,* 897 F.2d 773, 786-77 (5th Cir. 1990)(concluding that arguments made by intervenors which went "to the heart of the issue before the district court" waived any objection to personal jurisdiction of the court); *Sandler Assoc. v. Bellsouth Corp.,* 818 F.Supp. 695, 705-06 (D.Del. 1993)("[P]laintiffs were in no sense 'absentee' class members" after litigating objections to the settlement in the district court exercising constitutionally adequate opportunity to be heard, and commencing separate lawsuit: It was not a denial of due process to prohibit group of plaintiffs from opting out of certified class in state litigation and pursuing exclusive federal damages claim where such plaintiffs were parties to and actively participated in consolidated class action and consented to court's jurisdiction in objecting to class certification and settlement as plaintiffs were given and vigorously exercised constitutionally adequate opportunity to be heard on issue); *Network Professional Inc. v. Network Int'l Limited,* 146 F.R.D. 179, 184 (D.Minn. 1993)(even if defendants had properly raised jurisdictional defenses in their answer they clearly waived the defence by participating the lawsuit); *See also, Reynolds v. National Football League,* 584 F.2d 280, 285 (8th Cir. 1978)("The appellants were duly advised of this proceeding and of the proposed settlement and were afforded a full opportunity to present objections. Due process requires no more").

For a court to exercise personal jurisdiction, the party must have minimum contacts with the forum such that the maintenance of the suit does not violate "traditional nations of fair play and substantial justice." *International Shoe Co. v.*

Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) *citing Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278 (1940). This personal jurisdiction requirement is not an Article III restriction on the federal courts, but rather an individual liberty interest flowing from the Due Process Clause. *Insurance Corp. of Ireland, Ltd. et al. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). Like other such rights, the personal jurisdiction requirement can be waived. *Id.* at 703, 102 S.Ct. at 2105. Fed.R.Civ.P. 12(h) contemplates the involuntary waiver of a defence of lack of personal jurisdiction if it is not included in a motion or in a responsive pleading. Moreover, the rule "sets only the outer limits of waiver; it does not preclude waiver by implication." *Yedell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990), *citing Marquest Medical Prods. v. EMDE Corp.*, 496 F.Supp. 1242, 1245 n.1 (D.Col. 1980). Therefore, while a party to a mandatory class action who appears in court to contest inclusion in a class is analogous to a party who appears merely to contest jurisdiction and does not waive the jurisdictional objection, the party will be deemed to consent to jurisdiction if it actually litigates the adequacy of class representation or the underlying merits of the case. *White*, 41 F.3d. at 407-08, *citing Yedell*, 913 F.2d at 539 and *In re Real Estate*, 869 F.2d at 777-71.[10]

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[10] The primary case relied upon by Petitioners, *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), writ dismissed as improvidently granted, 114 S.Ct. 1359 (1994) does not create any conflict as that decision in no manner held there was an absolute right to opt-out of a Rule 23(b)(2) class after fully arguing the merits if the settlement to the court. Significantly, in *Brown*, the party effected by the preclusive effect of the prior action was an absent class member who did not participate in any manner in the original action, unlike Petitioners in the instant action. *Brown*, 982 F.2d at 392, 114 S.Ct. at 1361. *Brown*, therefore is

Shutts only mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff and damage claims predominate. *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992)(*citing Shutts*, 472 U.S. at 811-12). In the present case, there exists no absent class members whose due process rights must be protected in the fashion described in *Shutts*, since each of the Petitioner-objectors was subject to the jurisdiction of the District Court and more than fully heard.

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consistent with the Eighth Circuit's decision below, and decisions of other Circuits in permitting an opt-out right to absent class members in Rule 23(b)(2) classes in certain circumstances under its Rule 23(d)(2) discretionary power.

Moreover, in *Crawford v. Honig*, 37 F.3d 485, 487 & n.2 (9th Cir. 1994), a decision rendered subsequent to *Brown*, the Ninth Circuit itself failed to cite *Brown* for the broad reaching effect Petitioners rely. The Ninth Circuit in *Crawford* made clear that it did not decide due process mandates the right to opt out of a Rule 23(b)(2) class, although a court in its discretion may provide such a right:

> Depending on the type of class action suit, due process may require other safeguards in order for absent class members to be bound by the judgment. For example, the due process required in order to bind known class members in a class action suit for money damages includes adequate notice to the absent class members, adequate representation and an opportunity for the member to opt out of the suit. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Larry P.*, however, was a class action for injunctive relief certified under Fed.R.Civ.P. 23(b)(2) which does not require notice or permit members to opt out, although a court in its discretion may provide for an opt-out or notice. *See* Fed.R.Civ.P. 23(b)(2); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 n.3 (9th Cir. 1985). In a Rule 23(b)(2) class action for equitable relief, the due process rights of absent class members generally are satisfied by adequate representation alone. *See, Besinga v. United States*, 923 F.2d 133, 137 n.7 (9th Cir. 1991).

Thus, the narrow holding of *Shutts* has no direct application with respect to these Petitioners. Petition at A7-A9.

Furthermore, the Circuits are not divided in holding opt out rights are not constitutionally mandated in cases where sufficient alternative procedural safeguards have been employed. For instance, in *White* such procedural safeguards were found to be satisfied where the objectors were: (1) adequately represented by the named plaintiffs; (2) adequately represented by capable and experienced class counsel; (3) provided with adequate notice of the proposed settlement; (4) given the opportunity to object to the settlement; and (5) assured that the settlement will not be approved unless the court, after analyzing the facts and law of the case and considering all objections to the proposed settlement, determines it to be fair, reasonable and adequate. *White*, 41 F.3d at 407-08 *citing*, *White*, 836 F.Supp. at 1472-73, and *White*, 822 F.Supp. at 1411-12. *See*, *Crawford v. Honig*, 37 F.3d 485, 487 & n.2 (9th Cir. 1994); *Williams v. Burlington Northern Inc.*, 832 F.2d 100, 104 (7th Cir. 1987), *cert denied*, 485 U.S. 991, 108 S.Ct. 1298, 99 L.Ed.2d 508 (1988)(although plaintiff did not have the right to opt out, court "provided [plaintiff] with the equivalent due process protection that would be accorded to a Rule 23(b)(3) class member"), *Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. Supr. 1989)("we have concluded that when a portion of the relief which is sought is monetary, a member of a class certified under Rule 23(b)(2) has a Constitutional due process right to notification but not a right to opt out of the class."); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991)(same, dicta); *Robertson v. National Basketball Assoc.*, 556 F.2d 682, 685-86 (2d Cir.

1977)(discussing due process rights of mandatory class members prior to *Shutts)*.[11]

In the present action, the Eighth Circuit found the above-referenced elements satisfied. Petitioners participated extensively in the settlement process by moving to intervene pursuant to Fed.R.Civ.P. 24(a) and 24(b), by filing an extensive 24 page legal memorandum, by filing two reply memoranda with extensive charts and graphs objecting to the merits of the proposed settlement, adequacy of representation and class certification under Fed.R.Civ.P. 23(b)(1) and 23(b)(2). JA 25-49, 105-110, 144-158, 165, 169-74, and finally by being fully heard on appeal. Petitioners appealed the District Court's order to the Eighth Circuit Court of Appeals and personally appeared to argue their position. As in the above-referenced decisions, Petitioners fully addressed "the heart of the issues before the district court" which amounted to a knowingly and voluntary submission to the court's jurisdiction. As a result, due process has been afforded. Petitioners simply cannot claim they were denied an adequate opportunity to be heard. Contrary to Petitioner's position, and as recognized by the Eighth Circuit, the District Court had appropriate jurisdiction to properly consider the arguments of Petitioners attacking the substance of the settlement and adequacy of representation. As there is no division amongst the Circuits on this issue, certiorari should be denied.

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[11] *See also*, 1 Herbert Newburg and Alan Conte, *Newburg on Class Actions*, § 1.20, at 1-48 (3d ed. 1992).(discussing impact of *Shutts)*.

III. The Eighth Circuit's Decision Below, Is Not At Odds With the Ninth Circuit's Decision in *Brown v. Ticor Title Ins. Co.* Nor *Shutts.*

In addition to arguing that the Eighth Circuit's decision in this case violated Fed.R.Civ.P. 23(b)(2) itself, Petitioner's charge that the certification of the plaintiffs' damage claim under Rule 23 (b)(2) was unconstitutional. Petitioners argue that the due process clause of the federal Constitution requires that an absent class member, with any kind of money damage claim must absolutely be afforded an opportunity to opt out.[12] Petitioner argue they were denied due process when they were not given the right to opt out of the instant action.

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[12] The Supreme Court has stated that "'[d]ue process,', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Id.* (quoting) *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). Due process is satisfied, therefore, if the procedures which are followed are "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard', to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349, 96 S.Ct. at 909 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970).

In the case at Bar,the Eighth Circuit found due process had been afforded Petitioners as they were provided notice, extended the opportunity to be heard fully and completely on the merits which they vigorously exercised. Petition at A7-A9.

In support of their claims, Petitioners rely upon *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), where the Ninth Circuit held that under certain circumstances it violates due process to litigate damage claims of absent class members without giving them notice and a chance to opt out. *Brown*, 982 F.2d at 392. The opinion relies entirely on *Phillips Petroleum v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965 (1985), in which the Supreme Court held that, in order to bind known plaintiffs concerning claims "wholly or predominantly" for money damages, minimal due process -- meaning notice and an opportunity to be heard and participate in the litigation must be provided. *Id.* at 811-13 & n.3. As the decision in *Brown* explicitly acknowledges and stresses, however, "*Shutts*, is limited to claims 'wholly or predominantly for money damages.'" *Brown*, 982 F.2d at 392 (*quoting Shutts*, 472 U.S. at 811 & n.3). In particular the Supreme Court stated: "[w]e intimate no view concerning other types if class actions, such as those seeking equitable relief." *Shutts*, 472 U.S. at 811 & n3.[13] Thus, under *Shutts* and *Brown*, the constitutional due process requirement of notice and a right to opt-out applies only to cases where claims for monetary damages "predominate". Unlike the instant action, the Ninth Circuit in *Brown* specifically recognized that "substantial damage claims" were at issue. *Brown*, 982 F.2d at 392. Since class certification under Rule 23(b)(2) is permitted only where

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[13] The footnote in *Shutts* represents at least the second time that the Supreme Court has expressly declined to extend a due process analysis to class actions for injunctive or declaratory relief maintained under Fed.R.Civ.P. 23(b)(2). The first instance involved a requirement for individual notice in a Rule 23(b)(3) class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 & n.14, 94 S.Ct. 2140, 2151-52 & n. 14, 40 L.Ed.2d 732 (1974)."By its terms subdivision [23](c)(2) is inapplicable to class actions for injunctive or declaratory relief."

monetary damage claims do not predominate, *Brown's* due process based holding adds nothing to the limits on the availability of the (b)(2) form that are not already imposed by the rule itself. *See, Arnold*, 158 F.R.D. at 463.[14]

In *White v. National Football League*, 822 F.Supp. at 1410-12 (D.Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994) the Court distinguished the Ninth Circuit's decision in *Brown* and reached the same conclusion as the case at Bar. ("At most, *Brown* stands for the proposition that where a class action involves claims "wholly or predominantly" for money damages, and where the settlement of such class action accords only injunctive relief and no damage recovery, an absent nonresident class member's later claim for damages will not be barred.") The Court therefore, concluded that *Brown* had no application where: (1) the plaintiff classes' claims are predominantly injunctive in nature, and (2) the relief provided for by the terms of the settlement, although predominantly injunctive, also included payments to settle the damage claims of individual class members. *White*, 822 F.Supp. at 1412.

Given the fact the Eighth Circuit below found the claims asserted to be predominantly injunctive in nature, as in reality they are, and Petitioners not to be absent class members, as in reality they are not, unlike the situations in *Brown* and *Shutts*, certiorari should be denied.

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[14] The present settlement is also distinguishable from the settlement challenged in *Brown* because *Brown* involved class claims that were "wholly or predominantly" for money damages, yet the challenged settlement provided no damages recovery, but only injunctive relief. *Brown*, 982 F.2d at 392. *See, White*, 836 F.Supp. at 1471-72 & n. 31. The instant action involved claims for predominantly injunctive relief. Petition at A-3.

IV. Petitioners Mischaracterize the Nature of the Underlying Action and Settlement By Ignoring the Predominantly Injunctive Relief and Emphasizing the Ancillary Monetary Relief in Arguing That Only Certification Under Fed.R.Civ.P. 23(b)(3) Is Proper.

In their petition for a writ of certiorari, petitioners misconstrue the nature of the underlying action and predominant relief sought. Appellants arguments opposing the District Court's certification under 23(b)(1) and 23(b)(2) ignore the broad scope of this action, specifically the injunctive relief claimed, and concentrate solely on the ancillary monetary damages obtained.

In the present case, it is clear that the predominate remedy sought by the class was injunctive in nature. The complaint clearly requested the Court to grant judgement;

1. Declaring that Defendant's escrow account practices violate §10 of RESPA, and that Defendant may not require mortgagors to establish or maintain in an escrow account an actual cushion in excess of the cushion authorized by the underlying mortgage contract or the RESPA ceiling, whichever is less;

2. Permanently enjoining Defendant from requiring any mortgagor to establish or maintain in an escrow account an actual cushion in excess of the cushion authorized by the underlying mortgage contract or the RESPA ceiling, whichever is less;

3. Directing Defendant to recalculate for each mortgage held or serviced by them in the amount of each mortgagor's escrow balance, and to make such

> adjustments as are necessary to ensure that the balance in the escrow account does not exceed the RESPA ceiling or amount authorized by the underlying mortgage contract, whichever is less, and to pay to the mortgagor a refund of any excess balances plus interest.

JA at 195; Petition at A3, A7

The request for this injunctive relief found in these prayers, setting forth a standard of conduct for Mellon to follow, is undoubtedly the predominant relief sought since it will affect more persons and will have consequences over a longer time period than the monetary award. *Id.* The automatic refund of overcharged amounts, establishment of a standard of conduct for escrow servicing in the future, and institution of a monitoring mechanism is clearly predominant to the monetary damages sought in the form of interest payments on the excessive balances previously maintained. *Id.* Petition at A 11

Moreover, Courts have upheld the applicability of Rule 23(b)(2) when both the injunctive damages and relief sought were of equal importance. *See generally, Souza v. Scalone*, 64 FRD 654 (ND Cal. 1974); *Ventura v. New York City Health & Hosps. Corp.*, 125 FRD 595, 601 (SDNY 1989) (A class action under Rule 23(b)(2) "may be appropriate where a monetary award is but one element of an equitable remedy.") It is only where damage relief is exclusively sought or clearly the predominant form of relief requested that the case can be said to clearly fall outside the scope of Rule 23(b)(2), and thereby constitute an abuse of discretion on part of the District Court to certify it as such. As the complaint demonstrates, that is clearly not the case here.

Appellants erroneously characterize this action as primarily a damage case. The damage or "rebate" part of the class settlement, representing an interest payment on past surpluses, is in truth, a small part of this settlement. Because denial of the use of funds is the only measure of damages for past over-escrowing, these numbers are never going to be large. The primary relief in this and other similar cases is injunctive. The future escrow practices and the automatic refunds of current and future surplus funds (as opposed to interest on surplus funds), both flow solely from the injunctive aspect of the case, and involve tens of millions of homeowners' dollars. In short, the injunctive relief drives the entire case. Appellants' reference to this as primarily a damage case, from which their entire analysis flows, is simply wrong.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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March 21, 1996